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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; BOARD OF EDUCATION OF HORTONVILLE JOINT SCHOOL DISTRICT NO. 1; ROGER WEIHING, ROBERT HAUK, JEAN MEADS, FLOYD MEYER, MERLIN PLAMANN, VICTOR SCHROTH and RONALD SURPRISE, individually and as officers and members of the Board of Education of Hortonville Joint School District No. 1; and MARVIN OBRY, ROBERT KOHLS and GENE RIEDL, individually and as administrators of Hortonville Joint School District No. 1,

PETITIONERS,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court (A. 230-268) is reported officially at 66 Wis. 2d 469, and unofficially at 225 N.W.2d 658 and 88 L.R.R.M. 3075. The Wisconsin Circuit Court's opinion granting the School Board's motion for summary judgment (A. 172) is not officially

reported; unofficially, it is reported at 88 L.R.R.M. 2743. The Circuit Court's decision denying the plaintiff Association's motion for a temporary restraining order (A. 119) is not reported.

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered February 5, 1975. An order denying rehearings was issued March 28, 1975. (A. 284) The petition for a writ of certiorari was filed on June 19, 1975. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3). The petition for a writ of certiorari was granted on October 6, 1975.

QUESTION PRESENTED

Whether elected members of a public school board, who have the exclusive authority under state law to terminate teachers engaged in an illegal strike, are prohibited by the due process clause of the Federal Constitution from so doing because they are not sufficiently impartial decision makers.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section 1 of Article XIV of the Amendments to the Constitution of the United States provides as follows:

> ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1 Wis. Stat. § 118.22 (2), p. 2284 (1973) provides:

> "No teacher may be employed or dismissed except by a majority vote of the full membership of the board."

1 Wis. Stat. § 111.70 (4)(l), p. 2206 (1973) provides

> *"Strikes prohibited.* Nothing contained in this subchapter shall constitue a grant of the right to strike by any county or municipal employe and such strikes are hereby expressly prohibited."

STATEMENT OF THE CASE

Petitioners are a Wisconsin common school district, the School Board, its elected part-time members and its agents. The Hortonville School District serves a rural community of 8,500 persons. Its teaching employees have been represented by respondent Hortonville Education Association, an affiliate of the largest statewide teachers labor union, and of the National Education Association.

On March 18, 1974 the teaching employees of the district went on strike over the terms of a 1974-1975 collective bargaining agreement which would take effect in the fall of 1974. (A. 150-51, 231) Except for two days during which the School Board attempted to operate the schools with substitutes, the strike closed the schools. (A. 152, 232)

On March 20 and March 23, 1974, the school superintendent, by letter and at the direction of the School Board, invited the striking teachers to return to work. (A. 151-52, 231-32) Several teachers did return to work after the first letter, but none returned after the second letter. (A. 151-52, 231-32) On March 29, 1974 the School Board decided to schedule hearings to determine whether the teachers were

in fact striking as charged by the superintendent. (A. 152, 232) Individual hearings were planned pursuant to notices sent to each teacher stating that the teacher was charged with striking in violation of law and contract and that, if these charges were true, termination of his or her employment contract could result. (A. 153, 232)

Individual hearings were not held because the teachers chose to stand as a group and refused to answer questions from the Board or its counsel. The hearings therefore became a group hearing. (A. 233) Counsel for the teachers stated:

> "We have already indicated everybody got the same form and they are all charged with the same thing. They have consulted and conferred among themselves and concurred that they have done or not done the same things, all of which would be within the knowledge of management . . . ." (A. 86, 198)

Though aware that refusal to answer questions could result in the Board finding that they were in fact on strike, counsel for the Association asserted only that the Board could not infer from such refusal that the strike was illegal or a breach of contract. (A. 88-89, 199) Counsel for the Association stated that the proper course was to substitute further collective bargaining for the hearings. (A. 97) Counsel for the Association also objected to the Board acting as decisionmaker because of its:

> ". . . involvement as to management of this School District and its involvement in the labor dispute which is the basis for the board's consideration, but hard [sic] for a neutral tribunal and some disinterested third party. It seems to me it is no more fair that you should sit in judgment of the employees and [sic] the

> employees should be challenged to have violated your office by conduct in labor matters. What we have to have is a third party and I would like an answer to that." (A. 91)

In response, counsel for the Board reminded counsel for the Association of the availability of other forums. The teachers' counsel's response was:

> "As far as appropriate forms going out, as I said before, we objected to this proceeding, but beyond that it isn't going to do us any good, nor you, if we go to Employment Relations Commission with complaints that you have been bargaining in bad faith or we have been bargaining in bad faith. It isn't going to do you any good to have hearings or things we have done today. We can all stand and say we are people of principle and I am standing on my rights, and these people too, or you people may be doing. We must settle, and to do that you have to sit at the table and bargain, and we could do it in half the time you have already scheduled for whatever those things are with your employees. That's the only way you're going to settle it." (A. 97)

The hearing proceeded. Counsel for the Association, preserving the objection to the School Board conducting the hearing and repeating the argument that the Board should substitute bargaining, made an offer of proof relating primarily to prior bargaining between the parties, but did not deny the teachers were striking. (A. 94-96, 197) The Board rejected the offer of proof on grounds of materiality. (A. 96)

After the hearings closed, the Board adopted a resolution finding the teachers to be illegally striking. The resolution also terminated the employment contracts of the teach-

ers and directed the hiring of replacement teachers from within and without the district. (A. 116-17) The termination notice sent each teacher specifically stated that replacement teachers were being sought and advised that the teacher could apply for any vacancy. (A. 41) Only one striking teacher sought such employment, and was employed. (A. 160, 234) The schools, staffed with replacements, reopened on April 8, 1974. (A. 160, 192, 234)

On April 4, 1974 the Association and six of the teachers on behalf of the class of teachers began this action by serving a summons, order to show cause, complaint and supporting affidavits. (A. 6-37) The order to show cause was, in effect, a motion for a temporary injunction. It asked that the School Board be enjoined from hiring replacments. (A. 6) It did not ask that the teachers be reinstated. The complaint asked that the discharges be set aside, and declared null and void, but did not ask for reinstatement. (A. 13-14, 235) The complaint also asked that the School Board be enjoined from hiring replacements until such time as the teachers had been afforded a "full and fair hearing." (A. 14)

On April 11, 1974 the Wisconsin Circuit Court denied the Association's request for a temporary restraining order on the grounds that the teachers were on strike in violation of Wisconsin law and were suffering no irreparable harm due to the self-incurred economic loss attendant to a continuing strike. (A. 125-26) The Circuit Court's opinion specifically noted that the teachers were still on strike on April 11, 1974, seven days after the terminations. (A. 126)

On July 19, 1974, the circuit court granted the Board's motion for summary judgment on all issues involving the federal due process claim. (A. 172-203) Plaintiff Associa-

tion then petitioned the Wisconsin Supreme Court for leave to commence an original action raising for the first time certain federal constitutional claims. (A. 216) Leave was denied, but the Wisconsin Supreme Court ordered that any appeal of the Circuit Court's decision be expedited, and set a briefing schedule. (A. 227)

On appeal the Wisconsin Supreme Court explicitly resolved all state law questions in the School Board's favor, including the decision that:

> "From the statutes, the cases cited, and the contract, we conclude the school board did have the power to discharge the teachers who engaged in the prohibited strike." 66 Wis.2d at 481, 225 N.W.2d at 664-65 (A. 239).

The court then considered both the claims appealed and those sought to be raised in the petition for leave to commence an original action. 66 Wis.2d at 479, 225 N.W.2d at 663 (A. 236). Wisconsin's prohibition of public employee strikes was sustained against an equal protection claim. 66 Wis.2d at 487, 225 N.W.2d at 667 (A. 245).

Turning to respondent's federal due process claims the Wisconsin Court defined the issue narrowly: ". . . the appellants allege their constitutional inadequacy in only one respect, *i.e.*, the lack of an impartial decision maker." 66 Wis.2d at 491, 225 N.W.2d at 670 (A. 250).

After finding that constitutionally protected interests in property and liberty were implicated under its reading of *Board of Regents v. Roth*, 408 U.S. 564 (1972), a majority of the Wisconsin Supreme Court held that respondents were denied due process under the Fourteenth Amendment.

Relying on *Morrissey v. Brewer*, 408 U.S. 471 (1972), the court concluded that it was essential: ". . . even in cases of undisputed or stipulated facts, that an impartial decision-maker be charged with the responsibility of determining what action shall be taken on the basis of those facts." 66 Wis.2d at 493, 225 N.W.2d at 671 (A. 252).

The court stated, "This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited buget." 66 Wis.2d at 494, 225 N.W.2d at 671 (A. 253). There was no allegation or finding of a personal or pecuniary bias on the part of the members of the school board.

Despite the absence of an allegation or finding of a specific bias, despite the fact that the state statute (Wis. Stat. 118.22(2) (1973)) required that only the elected School Board could make the decision to discharge, and soley because the School Board was bargaining and was required by statute to bargain with the Association which represented the striking employees, the Wisconsin Court held that: ". . . the board was not an impartial decisionmaker in a constitutional sense. . . ." 66 Wis.2d at 494, 225 N.W.2d at 671 (A. 253).

The court's decision was limited to this federal procedural issue and did not hold that plaintiffs were unreasonably discharged.

The court said the available review of the School Board's decision would not "provide for review to determine whether another course of action such as mediation, injunction, continued collective bargaining or arbitration would have been a more reasonable response on the part of the decisionmaker." 66 Wis.2d at 496, 225 N.W.2d at

672 (A. 255). The court then directed that the discharged teachers could bring an action for *de novo* review of the Board's decision. 66 Wis.2d at 498, 225 N.W.2d at 673 (A. 257).

Both parties moved for rehearing. Both motions were denied. (A. 284)

After the Wisconsin Supreme Court denied the motions for rehearing, the teachers filed an action in the Federal District Court for the Eastern District of Wisconsin, seeking immediate reinstatement. The complaint affirmatively alleged that plaintiffs were striking in April of 1974. This case was dismissed upon the ground the teachers had presented their federal constitutional claims in state court, and could not re-litigate those claims in federal court. *Wisnoski v. Weihing*, 396 F.Supp. 1358 (E. D. Wis. 1975).

On August 14, 1975, respondents filed a petition for a *de novo* hearing in the Wisconsin Circuit Court. (Petition For De Novo Hearing) On October 6, 1975, this Court granted the School Board's Writ of Certiorari to the Wisconsin Supreme Court. The *de novo* hearing was stayed pending this Court's decision, by consent of the parties. (A. 328-30)

SUMMARY OF ARGUMENT

The plaintiff teachers were held to have been illegally striking, and such strikes were held to be a valid cause for discharge, under Wisconsin law as confirmed in this case.

The School Board had invited the teachers to stop striking; when they did not, the School Board afforded a record hearing, at which the teachers did not deny they were striking. The School Board discharged the teachers, and reopened the school with replacements. Although the striking teachers were invited to apply for employment, they did not, but remained on strike after commencing this action.

The Wisconsin Supreme Court held that federal due process prohibited the School Board from acting to discharge the teachers, solely because the School Board was also collectively bargaining with the teacher's union.

Wisconsin statutes require the School Board to operate schools, be responsible to the district electorate, and bargain with the teacher's union. The statutes also require that only the School Board can employ and terminate teachers.

The decision below effectively denies the electorate of a voice in its own affairs. The School Board is expected to be responsive to the electorate in deciding how to operate the school and allocate available revenue. The teachers have the right in Wisconsin to bargain about the effects of those decisions on employment, but in Wisconsin the bargaining process is not supposed to be affected by the cessation of educational services and political pressure upon the electorate and the School Board, which a strike causes.

The Wisconsin Supreme Court stated that the decision of what to do about the closed schools had to be made quick-

ly, and that the School Board had a duty to open and staff the schools, under state law.

The Wisconsin decision produces the result that the federal due process clause effectively prohibits the School Board from implementing its duty to open and staff schools, and has the effect of making illegal public employee strikes better protected than legal private employee strikes. A school board will not risk exercising its discretion, where *de novo* review of its exercise of discretion could result in paying two sets of teachers.

Where teachers are striking, do not stop striking even after notice of a hearing to determine the fact, and admit they are striking, they should be considered to have abandoned any property for purposes of considering whether further procedural process is constitutionally required.

The decision below interprets the federal due process clause in a manner which could inhibit states from granting employee property rights. Only by refraining from granting property can the Hortonville decision be avoided. The Wisconsin decision encourages employees to emphasize adversary aspects of the employer-employee relationship.

The bare presence of two functions vis a vis an employee does not disqualify a government agency from exercising substantively lawful discretion. This Court has been reluctant to limit government discretion, particularly in education.

No risk of an inaccurate determination of the fact of striking is present here, since the School Board had an interest in finding teachers who were not striking, and since the plaintiffs have admitted they were striking.

Morrissey v. Brewer, 408 U.S. 471 (1972) did not limit the ability of a government agency to exercise discretion where the facts are not disputed.

There is no suggestion or finding that the School Board had any personal bias, nor that they were acting otherwise than as dedicated public servants. Under *Withrow v. Larkin*, 421 U.S. 35 (1975) the School Board was therefore not disqualified.

Under pre-existing state law, the plaintiff teachers had the right to pursue review which would determine whether the discharges were substantively lawful, factually supportable, cause for discharge, and not colored by anti-union motivation. The teachers did not pursue any of these remedies.

The striking teachers had no property interest which would require that they be afforded a different decisionmaker. Plaintiffs could have avoided any loss of property simply by terminating their strike.

The allocation of bargaining and discharge decisions to an elected School Board is an intelligent grouping of legislative functions, working well. It should not be struck down by a *per se* challenge.

ARGUMENT

Wisconsin law provides that strikes by public school teachers are illegal, that striking is cause for discharge, and that only the School Board can discharge teachers for striking. In 1974, the Hortonville, Wisconsin, schools were closed because the teachers had elected to strike in order to force the employing School Board to accede to the demands of the teachers Association in the collective bargaining then in progress.

The School Board twice invited the teachers to stop striking and return to work. Each teacher was then notified that the school superintendent had informed the Board

the teacher was believed to be striking, and that a hearing would be held to determine if the charge was true. Record hearings were held at which the teachers were represented by counsel; the teachers did not contest the fact of a strike, but argued the School Board could not make the decision to discharge them.

The School Board terminated the teachers and hired replacements, and school resumed. In the termination notices the teachers were invited to apply for employment. Only one did so, and was rehired.

The Wisconsin Supreme Court held that the School Board could not discharge the teachers because it was not a sufficiently impartial decisionmaker under the Federal Constitution. Because under state law only the School Board could discharge teachers, the Wisconsin Supreme Court held that due process required that a state trial court determine *de novo* whether discharge was the most reasonable course of action for the School Board to have chosen.

The School Board terminated the teachers in order to hire replacements. The striking teachers were then under one year contracts. Three days before the strike they had been offered renewal contracts as required by Wis. Stat. § 118.22(2) (1973). The question whether to hire replacement teachers could not be divorced from the question whether to discharge the striking teachers. Under the Wisconsin Supreme Court decision no School Board can effectively exercise its right under state law to discharge teachers and operate the school with replacements because of the risk that it would end up with term contracts for two sets of teachers, and possible monetary liability for both staffs. See Wis. Stats. 118.22(2) (1973).

I. WISCONSIN STATUTES REQUIRE THAT SCHOOL DISTRICTS BE OPERATED THROUGH A SCHOOL BOARD IN ORDER TO IMPLEMENT THE VIEWS OF THE DISTRICT ELECTORATE; THE DECISION BELOW EFFECTIVELY DENIES THE ELECTORATE ITS POLICY VOICE.

A. The School Board Must Under Wisconsin Law Manage The School District Affairs, Hire And Fire Teachers, And Bargain With Unions Representing Its Teachers.

The Hortonville School District is a Wisconsin common school district. It is a fiscally independent government unit deriving revenue from taxes levied on the property of citizens in the district in addition to statutory state school aid. Wis. Stat. §§ 120.10, 120.12(3)(a) (1973). Annually, the School Board prepares a budget and presents it for approval to the electorate at the annual meeting. Wis. Stat. § 120.11 (3) (1973). If the annual meeting results in an insufficient levy, the School Board, within statutory limits, may levy additional amounts. Wis. Stat. § 120.12(3)(a) (1973).

The district is operated by the School Board which is responsible for the "possession, care, control and management of the property and affairs of the school district", subject only to direct electoral control at the annual meeting and to the authority specifically vested in other district officers. Wis. Stat. §§ 120.11(1), (2) (1973). The members of the School Board are elected by district voters. Wis. Stat. §120.03 (1973). By statute the School Board is the only body empowered to hire and fire teachers. Wis. Stat. § 118.22(2) (1973); 66 Wis.2d at 497, 225 N.W.2d at 673 (A. 256) Under Wis. Stat. § 118.22(2) (1973) teachers are employed on a year to year individual contract basis.

Wisconsin also has a comprehensive public employee labor relations statute called the Municipal Employment Relations Act, or MERA. Wis. Stat. § 111.70 *et. seq.* (1973). Public employers in Wisconsin, through their representatives and agents, are required to collectively bargain with the representatives of their employees. Wis. Stat. § 111.70(3)(a)4 (1973). Under MERA, the Hortonville School Board was required to meet and confer in good faith at reasonable times regarding wages, hours and conditions of employment with the Hortonville Education Association. However, neither the employer nor the union is compelled to agree to a proposal or make a concession. Wis. Stat. § 111.70(1)(d) (1973).

B. The Decision Below Effectively Denies The District's Electorate Of A Voice In Its Own Affairs.

The case arises from a public sector labor dispute. Public sector collective bargaining is predominantly a political process in which the interests of opposing groups are resolved in part through bargaining. See, Summers, *Public Employee Bargaining. A Political Perspective*, 83 Yale L. J. 1156 (1974); Shaw and Clark, *The Practical Differences Between Public And Private Sector Collective Bargaining*, 19 U.C.L.A. L. Rev. 867 (1972). In bargaining, like all other matters, the individual School Board member is expected to be responsive to his or her constituency. On some issues the teachers' interests will be adverse to those of the electorate. Teachers, for example, may favor allocating more revenue to salaries than other services or may desire a larger budget with a consequent increased tax levy. Naturally, some taxpayers and citizens may hold opposite views. The School Board, which is controlled by the ballot

box, is responsible, like thousands of other local government legislative bodies, for compromising the competing interests. However, in Wisconsin, the legislature has declared that compromise may not be influenced or controlled by the political and economic dislocations stemming from the interruption of important public services due to a strike.

Under Wisconsin law, both public sector collective bargaining and the concept of locally controlled school districts presuppose that the district electorate will have an effective voice in the decisions that determine the tax rate, quality of education and operation of schools. However, the electorate can further its interests only if its elected representative can effectively make the necessary decisions.

All of the possible responses to the illegal strike affect the interests of the district's electorate. Continuation of bargaining, with or without mediation or fact-finding (but with closed schools), arbitration, possible injunctive relief,[1] and discharge coupled with the hiring of replacements are inseparable from considerations of the size and allocation of tax revenues, the quality of education and the speedy resumption of classes.

An adjudicatory procedure before a judge or administrative body cannot adequately respond to the views of thousands of people who are affected by the strike. The ballot box is their only meaningful opportunity to be heard. *Cf. Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915). Since the School Board's determination of how to respond to the strike is not entitled to any deference in the *de novo* hearing mandated by the Wisconsin decision, the citizens of the Hortonville School

[1]Public employees have continued to strike, or begun another strike, despite an injunction. *See Rockwell v. Board of Education*, 393 Mich. 616, 635, 227 N.W.2d 736, 744 (1975), *appeal docketed*, 44 U.S.L.W. 3207 (U.S. No. 75-466).

District have lost their right to be effectively heard, and the balance struck by the state legislature has been materially altered by this application of the Federal Constitution. Compare *Wood v. Strickland*, 420 U.S. 308 (1975).

II. THE DECISION TO REOPEN THE PUBLIC SCHOOLS BY DISCHARGING THE STRIKING TEACHERS HAD TO BE EFFECTIVELY IMPLEMENTED AT THE TIME OF THE STRIKE.

Because education was at a standstill, the School Board had to select a course of action. Because the conduct was continuing, the action selected had to be selected and implemented in April, 1974, not later. The School Board was not then seeking to cope with past conduct. "When the teachers went on strike, the School Board was undoubtedly faced with a situation that needed immediate attention. Clearly, it had a duty to keep the schools open and staff them with competent teachers." 66 Wis.2d at 496, 225 N.W.2d at 672 (A. 255).

The Wisconsin Supreme Court thus not only decided the School Board had the right to discharge the teachers under state law, but indicated the Board may have the duty to discharge if the result is the reopening of the schools. 66 Wis.2d at 481, 496-97, 225 N.W.2d at 664-65, 672 (A. 239, 255-56). See *Curkeet v. Joint School District*, 159 Wis. 149, 149 N.W. 708 (1914).

In Wisconsin there is an additional need for speed because the School District must provide school for a minimum number of statutory days before June 30 to remain eligible for state monetary school aid. Wis. Stat. §§ 121.02 (1)(h), 121.17(2)(a), 115.01(6) (1973).

Other courts have recognized that public employee strikes require prompt response by the government. *Bulloch*

v. Mumford, 509 F.2d 384 (D.C. Cir. 1974), *reh. en banc den.*, 509 F.2d 388 (1975); *Collins v. Rockefeller*, 35 N.Y. 2d 547, 324 N.E.2d 113 (1974), *appeal dismissed sub nom, Collins v. Carey*, 43 U.S.L.W. 3613 (1975); *Simard v. Board of Education*, 473 F.2d 988 (2d Cir. 1973).

In *Rockwell v. Board of Education*, 393 Mich. 616, 635, 227 N.W.2d 736, 744 (1975), *appeal docketed*, 44 U.S.L.W. 3207 (U.S. No. 75-466) the court said the "hiring of replacements often cannot await time consuming adjudicatory processes." *Compare Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974), in which the Court declined to allow procedural due process to frustrate Puerto Rico's legitimate interests in controlling the use of a yacht in criminal activities by summary seizure.

The Wisconsin application of the Federal Constitution unnecessarily and materially interfered with the governmental need to reopen its schools by acting quickly.

III. THE DECISION BELOW WOULD MAKE ILLEGAL PUBLIC EMPLOYEE STRIKES BETTER PROTECTED THAN PRIVATE SECTOR STRIKES WHICH ARE LAWFUL.

Wisconsin prohibits public employee strikes. That prohibition is a recognition that the public employer is to continue its government function,[2] in this case education.[3] Even

[2]In granting public employees collective bargaining rights the Wisconsin legislature stated: "In creating this subchapter the legislature recognizes that the public employer must exercise its powers and responsibilities to act for the government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter." Wis. Stat. § 111.70(1)(d) (1973).

[3]"[E]ducation is perhaps the most important function of state and local governments." *Brown v. Board of Education*, 346 U.S. 483, 493 (1954). The significance of providing educational services (see *Goss v. Lopez*, 419 U.S. 565 (1975)) is not diminished merely because the teachers, by engaging in illegal conduct, choose to interrupt it for their own economic interests.

though public employees have been granted bargaining rights, public employees may constitutionally be denied the right to strike. *United Federation Of Postal Workers v. Blount*, 325 F.Supp. 879 (D.D.C.), *aff'd.*, 404 U.S. 802 (1971).

Despite Wisconsin's obvious interest in not having its public policy defeated by a due process holding that encourages public employees to strike, the effect of this decision is that the employer's ability to respond effectively to a strike is impaired. The employees are thereby insulated by the federal due process clause from the state's prohibition against strikes. This result vitiates *Blount*.

The private sector labor relations rules illustrate how Wisconsin's public sector collective bargaining scheme is frustrated by the Wisconsin Court's decision. Under the National Labor Relations Act, 61 Stat. 136 (1947) *et seq.*, 29 U.S.C. § 151 *et seq.* some strikes are protected. Although the employee is protected against employer discrimination for engaging in a strike, the NLRA allows the economic striker to be permanently replaced. *N.L.R.B. v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938). The only interest served by permanent replacement of a nonpublic employee is the employer's interest in continuing its business.

Under the National Labor Relations Act, 29 U.S.C. § 158(d), an employee who strikes during the statutory "cooling off" period ceases to be an employee. This concept of abandonment of rights for NLRA purposes is designed to assure the parties of a bargaining atmosphere free from the tensions and problems associated with a strike.

Society's interests in allowing a private employer to operate during a *lawful* strike are not greater than society's in-

terest in the government's ability to function during an *unlawful* strike. The public employer must be able to replace employees in order to fulfill its duty to operate the schools.

Under the Wisconsin Supreme Court's application of the Federal Constitution, if teachers strike, they can effectively accomplish collateral objects by closing the schools, since the employer cannot implement a lawful response to the economic and political pressure that results from closed schools.

The procedures which were afforded the Hortonville teachers by the School Board in this case were not only consistent with but went well beyond anything mandated by statute. In Wisconsin, the same statute which requires the Board to grant a property interest (an annual contract) provides that only the Board can take it away. Wis. Stat. § 118.22(2) (1973). Procedurally, state statutes require only that "[n]o teacher may be employed or dismissed except by a majority vote of the full membership of the board." Wis. Stat. § 118.22(2) (1973). Accordingly, respondents cannot have been unconstitutionally deprived of any property interest conferred by that statute. Compare the opinion of Mr. Justice Rehnquist in *Arnett v. Kennedy*, 416 U.S. 134 (1974).

Where, as here, the teachers have been notified they are considered to be striking, and do not contest the fact even at a record hearing, they should be considered to have abandoned any property for Federal due process purposes. *Farrelly v. Timberlane Regional School District*, 114 N.H. 564, 324 A.2d 723 (1974).

IV. FEDERAL DUE PROCESS SHOULD ALLOW STATES TO GRANT PROPERTY RIGHTS AND EMPLOYEE BARGAINING RIGHTS AS THEY WISH; THE EFFECT OF THE WISCONSIN DECISION IS TO INHIBIT THE LEGISLATIVE GRANTING OF RIGHTS.

State employee property rights are created by state law. *Board of Regents v. Roth*, 408 U.S. 546 (1972). Legislatures have also granted employees bargaining rights. Deciding in this case that the striking employees had abandoned their property would not prevent legislatures from creating any substantive or procedural right, including even the right to strike. Nor would such a decision prevent government employers from re-hiring strikers on any terms agreed upon. See, *National Education Association v. Lee County Board of Public Instruction*, 260 So.2d 206 (Fla., 1972).

By contrast, the Wisconsin decision requires legislatures either to vest policy choices in an agency which does not have responsibility to the electorate or the government involved, or requires legislators to refrain from granting property rights to employees, as a means of avoiding the "impartial decisionmaker" dilemma which results from the Wisconsin Court's decision.[4]

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[4]The Wisconsin Supreme Court held that the reasons for discharge, i.e., breach of contract and striking contrary to law implicated the teachers' liberty interest, because "such charges could detrimentally affect an individual's reputation in the labor market and thereby significantly undermine his opportunities for re-employment." 66 Wis. 2d at 490-91, 225 N.W.2d at 669, (A. 249). Petitioners think that plaintiffs' liberty interests are not involved, and the Wisconsin decision should be reversed. The MERA contains no criminal penalties for violating the strike prohibition. The teachers alleged the strike in court pleadings. (A. 220) Further, the teachers themselves proclaimed they were on strike by their picketing. See the Findings of the Wisconsin Employment Compensation Divison, reprinted in the Petition for Certiorari herein at A. 86, 87. They themselves did not perceive their conduct as dishonest, immoral or stigmatizing. *Board of Regents v.*

Legislatures may be further deterred from granting property rights to employees because the Wisconsin decision requires either that courts make *de novo* determinations, or that the legislature create (and fund) double agencies for each unit of government, in order to provide "uninvolved" decisionmakers.

Although the decision is by its terms limited to teachers, it could logically apply to any unit of government where the employer must also bargain with a union, including the State itself.

Any employer-employee relationship is to some extent adversary[5] as to policy choices; what to teach and how to teach it, for example. The Wisconsin decision encourages employees to emphasize the adversary relationship as a means of substituting a court as the effective decisionmaker. Compare *Johnson v. Board of Regents*, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd.*, 510 F.2d 975, (7th Cir., 1975) where a university chancellor who had participated in a decision that layoffs were necessary also decided who should be laid off. The challenge to that allocation of functions upon due process grounds was unsuccessful.

Roth, 408 U.S. 564, 573 (1972). Compare *Robison v. Wichita Falls & North Texas Com. Act. Corp.*, 507 F.2d 245 (5th Cir. 1975).

Future employment opportunities were not foreclosed since the Board itself offered to reemploy them. (A. 40, 158) That offer can be communicated by the employees to future employers. On nearly identical facts no liberty interest was found. *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091 (6th Cir. 1975).

[5]The Wisconsin Supreme Court said: ". . .[i]n those situations where an employed teacher is discharged or otherwise disciplined and due process is required, and the School Board is in an adversary position. . . ." 66 Wis.2d at 498, 225 N.W.2d at 673 (A. 257).

V. THIS COURT'S PRIOR DECISIONS DO NOT PROHIBIT A LOCAL ELECTED GOVERNMENT ENTITY FROM EFFECTIVELY IMPLEMENTING A POLICY TO CONTINUE ITS MANDATED LEGAL FUNCTION MERELY BECAUSE IT ALSO COLLECTIVELY BARGAINS WITH EMPLOYEES WHOSE STRIKE HAS STOPPED THOSE FUNCTIONS.

The touchstone of the procedural due process clause of the Federal Constitution is protection of an individual's property or liberty from arbitrary deprivation by the government. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).[6] Where government decisions hinge on findings of fact the Constitution requires those procedural elements which enhance the government's ability to ascertain the true facts thereby reducing the possibility of mistaken or erroneous action. E.g., *Goss v. Lopez*, 419 U.S. 565 (1975); *Wolff v. McDonnell, supra; Gagnon v. Scarpelli*, 411 U.S. 778 (1973); *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Goldberg v. Kelly*, 397 U.S. 254 (1970). However, this Court has carefully avoided applying the due process clause in a manner that circumscribes the ability of the government to exercise informed discretion. *Wolff v. McDonnell, supra; Goss v. Lopez, supra.* The Court has been particularly reluctant to limit discretion in the areas of employment and education. See, *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Opinion of Mr. Justice Powell, concurring); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961); *Goss v Lopez, supra.*

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[6]Collateral benefits may result from the prescription of particular procedures. For example, judicial review is enhanced by requiring actions to be taken only after a record hearing. See, McCormack, *The Purpose of Due Process: Fair Hearing or Vehicle For Judicial Review*, 52 Tex. L. Rev. 1257 (1974). But record hearings have not been uniformly required by this Court. E.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Morrissey v. Brewer*, 409 U.S. 471 (1973). In any event, a record hearing was held in this case.

In *Wood v. Strickland*, 420 U.S. 308 (1975), school officials were sued for damages by students alleging that in expelling them the school officials had denied them due process of law. In determining the standard governing immunity for School Board members, this Court stated that common law traditions and public policy considerations entitled school officials to qualified immunity from liability for damages under the Civil Rights Act. The extent of that immunity, however worded, "must be such that public school officials understand that action taken in the good faith fulfillment of their responsibilities and within the bounds of reason under all the circumstances will not be punished and that they need not exercise their discretion with undue timidity." 420 U.S. at 308. After all "[t]he system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members, and § 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of a specific constitutional guarantee." 420 U.S. at 326.

Since there is no risk of a decision based on erroneous or mistaken facts in this case, the decision below unnecessarily circumscribes the discretion of school officials.

A. The School Board Could Accurately Determine That The Teachers Were Striking.

The plaintiffs here do not attack the fact-finding procedures used by the School Board; the teachers conceded that the Board could find they were striking. (A. 86, 98) The Wisconsin Supreme Court held they were striking and that the strike was prohibited by state law. The teachers

were granted a hearing after notice on charges filed by the school superintendent, were represented by counsel, and were provided an opportunity to present relevant evidence and an opportunity to argue on the record.[7] There are no allegations of pecuniary interest or personal bias by any member of the Board. Compare, *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Tumey v. Ohio*, 273 U.S. 510 (1927).

The School Board had no responsibility that might tempt it to erroneously find a teacher to be striking. The School Board wanted and needed to find teachers who were not striking in order to conduct classes. Compare, *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). A nonstriking teacher who has not reported for work is only absent. Return to the classroom is imminent. A return to work is in the Board's interest. A correct finding of fact is compatible with both the individual's interest and the Board's. These factors were noted in both *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091, 1099 (6th Cir. 1975) and *Rockwell v. Board of Education*, 393 Mich. 616, 227 N.W.2d 736 (1975), *appeal docketed*, 44 U.S.L.W. 3207 (U.S. No. 75-466). In both cases no Federal Constitutional defect was found in the employers holding hearings to determine wheth-

[7]There is no dispute that plaintiffs were given an opportunity to present their views on what to do in response to the continuing strike. The notices of hearing indicated that discharge was being considered as a response to the continuing strike. (A. 39, 237). Repeatedly, counsel for the Association argued that bargaining was the only way to settle the dispute. (A. 72, 73, 88, 97). Those arguments did not include an offer to return to work. Counsel for the Association, in fact, at no time indicated when the teachers would return. That the Board was not persuaded to substitute more bargaining coupled with continuation of the strike for the hearings does not suggest that the plaintiffs were denied a meaningful opportunity to be heard.

er employees were in fact striking. *Rockwell* also notes that the risk of erroneous identification of a striker is further minimized by procedures that invite the teacher to return to work before the hearing. That was done twice by the Hortonville School Board. (A. 151-52, 231-32) Those strikers who did return-to work were not discharged. (A. 160, 234)

B. Prior Cases Do Not Hold That A Government Cannot Exercise The Discretion Given To It By Statute Where The Facts Are Undisputed.

The Wisconsin Supreme Court recognized that plaintiff teacher's due process claim was not directed at the Board's fact-finding processes. The procedural attack here is directed at the School Board's statutory discretion to determine what to do about the illegal strike.

The Wisconsin decision holds that *Morrissey v. Brewer*, 408 U.S. 471 (1972) requires an uninvolved decisionmaker to determine what to do about undisputed facts. *Morrissey* involved review of an initial decision that the parolee had engaged in conduct that warranted revocation of parole. The risk of an arbitrary deprivation of liberty was obvious: the state provided no hearing of any kind prior to imprisonment. Both the existence of a parole violation and the decision whether to revoke parole depended on accurate knowledge of the parolee's *past* conduct. 408 U.S. at 480, 484. This Court ordered only improved fact-finding procedures. The parole board, which had a predictive and discretionary function in addition to its fact-finding responsibilities, was not prohibited from determining whether that conduct, accurately established, warranted revocation: "If it is determined that petitioners admitted parole violations

to the parole board, as Iowa contends, and if those violations are found to be reasonable grounds for revoking parole under state standards, that would end the matter." 408 U.S. at 490.

Goldberg v. Kelly, 397 U.S. 254 (1970) also involved fact-finding procedures—the application of existing welfare standards to individual cases. Fact-finding was also the concern in *Tumey v. Ohio*, 273 U.S. 510 (1927) and *Ward v. Village of Monroeville*, 409 U.S. 57 (1972). In both cases the mayor/judge was responsible for determining what the defendant's past conduct was and whether that conduct was prohibited by traffic laws.

In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) this Court declined to require counsel in all probation revocation hearings because in most probation revocation proceedings the probationer admits the charges against him or has been convicted of another crime. To introduce counsel unnecessarily into the probation revocation hearing was thought to alter significantly the role of the decisionmaker from one of a rehabilitative body familiar with the problems and practice of probation to that of a judge and thereby possibly reduce the state's ability to implement its rehabilitative objectives. 411 U.S. at 787-89.

None of these cases holds or even suggests that an elected School Board is constitutionally prohibited from exercising its substantive right to discharge the striking employees.

C. *Withrow v. Larkin*, 421 U.S. 35 (1975) Recognizes That The Bare Presence Of Two Functions Does Not Disqualify A Decisionmaker.

The Wisconsin Supreme Court found no suggestion, allegation or proof that the School Board members did not

act in good faith. The Court stated: "This is not to suggest, of course, that the board members were anything but dedicated public servants, trying to provide the district with quality education while still keeping within its limited budget." 66 Wis.2d at 494, 225 N.W.2d at 671 (A. 253) That statement is consistent with this Court's decisions: "Without a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' *United States v. Morgan,* 313 U.S. 409, 421 (1941)." *Withrow v. Larkin,* 421 U.S. 35, 55 (1975). *See also, Suckle v. Madison General Hospital,* 362 F.Supp. 1196 (W.D. Wis. 1973), *aff'd.,* 499 F.2d 1364 (7th Cir. 1974).

Groppi v. Leslie, 404 U.S. 496 (1972), "assumes that there are situations in which there is no need for an impartial decisionmaker if the right to notice and opportunity to be heard is adequately respected." *Lucas v. Wis. Electric Power Co.,* 466 F.2d 638 (7th Cir. 1972). In *Groppi* the legislature held the defendant in contempt (which resulted in imprisonment) two days after the conduct occurred in the legislative chambers. The legislature provided the defendant with no notice or opportunity to be heard before passing the contempt resolution. Noting that there was no need to act quickly because the conduct which had prevented the legislature from pursuing its business had ceased, this Court reversed because the defendant had no opportunity to be heard.

In *Arnett v. Kennedy,* 416 U.S. 134 (1974) the Court declined to apply procedural due process to void the decision of a government official to discharge one employee who had allegedly made disparaging comments about the

official, where the comments formed the basis for the discharge. In *Arnett* the government could have easily reassigned the decisionmaking responsibility to another individual within the agency who would apply the agency's substantive standards. Here, the state's interest in maintaing the School Board as decisionmaker is substantial. In such circumstances a showing of actual pecuniary interest or personal bias should be required before concluding that the proceeding was constitutionally defective. Compare, *Gibson v. Berryhill,* 411 U.S. 564 (1973), *Tumey v. Ohio,* 273 U.S. 510 (1927) and *Mayberry v. Pennsylvania,* 400 U.S. 455 (1971), with *Withrow v. Larkin, supra.*[8] See also the opinion of Mr. Justice White in *Arnett v. Kennedy,* 416 U.S. at 171.

VI. REVIEW PROVIDED UNDER STATE LAW PROTECTED AGAINST ANY SUBSTANTIVELY UNLAWFUL DISCHARGES AND ANY FACTUAL ERROR.

Review of the School Board's decision to discharge the striking teachers was available by common law writ of certiorari, as the Wisconsin Supreme Court noted. 66 Wis. 2d at 496, 225 N.W.2d 672 (A. 255). In a certiorari proceeding the court could determine whether the Board kept within its jurisdiction, acted on a correct theory of law, whether it acted arbitrarily and whether the evidence supported the determination. 66 Wis.2d at 496, 225 N.W.2d 672 (A. 255).

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[8] *Ward v. Village of Monroeville,* 409 U.S. 57 (1972) is consistent. Whether a driver has violated the traffic code should not be influenced by the city's financial problems. However, the decision, "what to do" about schools closed by an illegal strike *must* be influenced by the district's financial condition and the need to provide educational services.

The Wisconsin Supreme Court also cited *Millar v. Joint School District No. 2*, 2 Wis.2d 303, 86 N.W.2d 455 (1957). Under *Millar* teachers have the right to bring a breach of contract action, in which a court can review the evidence relied upon by the School Board and determine whether the improper conduct found constitutes sufficient cause for discharge.

The striking teachers did not pursue either remedy.

Under the Wisconsin Municipal Employment Relations Act (MERA), it is a prohibited practice for either party to fail to bargain in good faith, or to breach a collective bargaining agreement. An employer may not encourge or discourge membership in a labor organization by discrimination in regard to terms or conditions of employment (which includes discharge). Wis. Stat. § 111.70(3) (1973); *Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B.*, 35 Wis.2d 540, 151 N.W.2d 617 (1967). There is no allegation or finding that the strike at Hortonville was related to a Board prohibited practice. Neither any teacher nor the teachers' Association has ever filed any prohibited practice complaint over any aspect of the collective bargaining or the strike. The Wisconsin Supreme Court cited *Muskego-Norway* in discussing the review available to the teachers under state law. *Muskego-Norway* holds that the WERC is an expert agency in labor matters, with broad powers to fashion relief, including the authority to overturn a discharge even if only one of the motives for any discharge is to discriminate against lawful union activities.

It is not clear why the Wisconsin Supreme Court considered these alternative remedies inadequate. Apparently, that Court was influenced by its speculation that the School Board might choose discharge and replacement as a convenient means to eliminate the labor dispute. However, this unsupported speculation does not warrant a finding that the Board is a constitutionally deficient decisionmaker. The possibility that the Board was so motivated is directly contradicted by the finding that the record does not suggest anything but actions of dedicated public servants. 66 Wis. 2d at 494, 225 N.W.2d at 617 (A. 253). Any anti-union bias is clearly prohibited by the MERA. Here, the Board's termination notice advised the teachers that they were eligible for rehire. That offer prevents any inference of anti-union motivation as evidenced by respondents failure to seek relief under the MERA.

VII. THE STRIKING TEACHERS HAD NO PROPERTY INTEREST WHICH REQUIRED THAT THEY BE AFFORDED A DIFFERENT DECISIONMAKER SINCE THE CONDUCT FOR WHICH THEY WERE DISCHARGED WAS CONTINUING; DISCHARGE COULD HAVE BEEN AVOIDED MERELY BY RETURNING TO WORK.

The focus of this case is not on past conduct but on continuing illegal conduct that stops the government's entire function. That continuing conduct is deliberate and wholly within the control of plaintiffs. Plaintiffs could have avoided any hardship or loss by simply accepting any of the several Board solicitions to return to work.

Plaintiffs were not paid while they were striking, and thus any interest in employment they may have had did not include an immediate income stream. Plaintiffs had the ability to avoid any deprivation. All that was required was that plaintiffs abandon their illegal action and respond to the Board's persistent entreaties to return to work. Even after the Board communicated that it had determined that

the district's interests required opening the schools, the plaintiffs refused to mitigate their unlawful conduct.

Since the status quo after the strike began and before the discharges was that the teachers were not performing the duties required of them as a condition of their employment, the teachers are here essentially contending they have a property interest in remaining on strike and unreplaced. *cf. Farrelly v. Timberlane Regional School District*, 114 N.H. 564, 324 A.2d 723 (1974).

VIII. CONCLUSION

The allocation of bargaining and employment-discharge decisions to the elected School Board is an intelligent grouping of government functions for a small local unit of government.

The striking teachers had no significant legitimate interest which would be served by upsetting the statutory allocation of functions. Thus, the Wisconsin Supreme Court's decision unnecessarily sacrifices the State's interest to insubstantial Federal constitutional concerns.

The *per se* challenge to the School Board's role "assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Richardson v. Perales*, 402 U.S. 389 (1971).

The judgment of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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